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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership, Petitioner, vs. MONTANA BOARD OF HOUSING, Respondent, CENTER STREET LP, SWEET GRASS APARTMENTS LP, SOROPTIMIST VILLAGE LP, FARMHOUSE PARTNERS-HAGGERTY LP and PARKVIEW VILLAGE LLP, Intervenors.	Cause No. DDV-2012-356 **RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

Respondent Montana Board of Housing ("the Board"), by and through its undersigned counsel, hereby submits this reply brief in support of its Motion to Dismiss.

I. THIS MOTION SHOULD BE TREATED AS A MOTION FOR SUMMARY JUDGMENT UNDER M.R.CIV.P. 56 AND RELEVANT MATERIALS OUTSIDE THE PLEADINGS MAY BE CONSIDERED BY THE COURT.

FHVR argues that in ruling on this motion, the Court may consider only facts alleged in

FHVR's Petition for Judicial Review. FHVR argues that the Board improperly submitted and referenced the Reservation Agreements entered into between the Board and the successful tax credit applicants, and the contractual obligations and monetary investments made by the successful applicants in reliance upon the Reservation Agreements. FHVR therefore argues that the Court may not consider this evidence. FHVR's argument lacks merit.

Rule 12 permits the Court to consider material outside the pleadings by converting a motion to dismiss into a motion for summary judgment when matters outside the pleadings are presented to the Court. Rule 12(d) provides:

> **(d) Result of Presenting Matters outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

M.R.Civ.P. 12(d). Thus, the Court has discretion to include or exclude matters presented to it that are outside of the pleadings when considering a motion to dismiss. If it chooses to include matters outside of the pleadings, it must treat the motion as a motion for summary judgment under Rule 56 and provide notice to the parties of its intention to do so. *Meagher v. Butte–Silver Bow City–County*, 2007 MT 129, ¶16, 337 Mont. 339, 160 P.3d 552. The purpose of the notice is to allow the parties a reasonable opportunity to present all material pertinent to the motion and avoid surprise. This includes an opportunity to produce additional facts by affidavit or otherwise which would establish a genuine issue of material fact to preclude summary judgment under Rule 56. *Id.*

The Board has provided the Court with copies of the "Reservation Agreements" attached as Exhibits D through I to its initial Brief in Support of Motion to Dismiss to enable the Court to make its subject matter jurisdiction determination based upon the pertinent documents. There is no sound reason not to consider the critical evidence regarding the Reservation Agreements on the issue of subject matter jurisdiction.

The Board requests that the Court convert this motion to a motion for Summary Judgment pursuant to Rule 56 and notify the parties of its intention to do so. For purposes of Rule 56 consideration, the Board has submitted herewith the Affidavit of Mary Bair.

According to Mont. R. Civ. P. 56(c), summary judgment is appropriate when there is "no

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Hajenga v. Schwein*, 2007 MT 80, ¶ 11, 336 Mont 507, 155 P.3d 1241. "The purpose of summary judgment is to dispose of those actions which do not raise genuine issues of material fact and to eliminate the expense and burden of unnecessary trials." *Id.* A party opposing summary judgment must rely upon more than mere denial or speculation to create an issue of material fact. *Ehrman v. Kaufman, Vidal, Hileman & Ramlow, PC*, 2010 MT 284, ¶ 10, 358 Mont. 519, 246 P.3d 1048.

II. FHVR HAS ERRONEOUSLY CHARACTERIZED THE SCORING, AWARD AND ALLOCATION PROCESSES.

FHVR has mischaracterized certain important aspects of the process which require clarification. The Board has set forth relevant facts in its brief. These and other relevant facts are supported by the Affidavit of Mary Bair.

FHVR alleges that on February 13, 2012, the Board held a "hearing" pursuant to ARM 8.111.603(3) to hear presentations from applicants. FHVR further alleges that Board staff thereafter scored the tax credit applications and incorrectly "reduced" the scoring for FHVR's application to 100 points from a score of 106 or 107. FHVR alleges that it sent a letter to Board staff requesting "correction" of its scoring, but that staff refused to "correct" the scoring and that the Board refused to review the staff's scoring of its application. FHVR Response Brief at 2-3. FHVR also alleges that the Board has not "issued" the tax credits and that the Reservation Agreements "do not guarantee" the applicants' right to the tax credits. These allegations are untrue and misleading.

At its regular monthly meeting on February 13, 2012 meeting, the Board provided an opportunity for applicants to present their applications to the Board, as provided in ARM 8.111.603(3). This meeting was not, however, a "hearing" as suggested by FHVR. This was merely a Board meeting in which applicants were provided an opportunity to present their projects to the Board. *See* Exhibit B to Board's initial Brief in Support of Motion to Dismiss, ARM 8.111.603(3); Affidavit of Mary Bair ("Bair Aff."), ¶ 5.

Tax credit applications are evaluated by staff for conformance with the criteria in the QAP, using the point system provided in the QAP. *Id.* The QAP provides that applications will "qualify" for or "receive" points or that points will be "assigned," "scored" or "awarded" based

upon the criteria provided in the QAP. *See* Exhibit C to Board's initial Brief in Support of Motion to Dismiss, QAP, pp. 19 - 25. Board staff scored all applications and, as with other applications, awarded points to the FHVR application based upon the QAP criteria. No application, including FHVR's application, is presumed to score any particular number of points or is entitled to any pre-set point score. Bair Aff., ¶ 6.

FHVR's project was awarded 100 points on the basis of the Development Selection Criteria in the QAP. The score was never "reduced" from the total of 108 points. The score of 100 points qualified the project for consideration by the Board. In addition to FHVR, 6 other projects scored above the minimum number point threshold but were not awarded 2012 tax credits. Bair Aff., ¶ 7.

In response to telephone calls and an April 5, 2012 letter from FHVR regarding its score, Board staff reviewed the scoring of the FHVR application and confirmed that the scoring was in accordance with the QAP. Staff did advise FHVR, however, that scoring was for the purposes of determining whether the applications met the QAP criteria and would not control the tax credit awards. Bair Aff., ¶ 8. Board staff did submit FHVR's April 5, 2012 letter to the Board at and for purposes of the April 9, 2012 allocation meeting. FHVR's representative, Craig Taylor, addressed its scoring argument to the Board during that meeting and requested an increase in FHVR's score. Bair Aff., ¶ 9.

Although FHVR's application was not among the highest scoring applications, the Board considered a motion to award tax credits to the project. In considering this project, the Board discussed concerns regarding the degree and nature of involvement in and support by the Veterans Administration for the project and concerns regarding the cost of the project. During discussion of FHVR's application, one Board member specifically asked staff whether the information provided by FHVR regarding scoring of its application changed staff's scoring of the application, and staff replied that staff was comfortable that the project was scored in conformance with the provisions of the QAP. The motion to award tax credits for the FHVR project failed on a 3-3 tie vote. Bair Aff., ¶ 10.

Under the 2012 QAP, the awarding of points to projects is for the purpose of determining that the projects meet at least the minimum development selection criteria of the QAP and to assist the Board in evaluating projects, but does not control the selection of projects that will

receive an award of tax credits. The QAP provides that the Board will select the projects to receive an award of tax credits that it determines best meets the needs of low income people within the state of Montana regardless of the points scored by each of the several projects or staff recommendations. Bair Aff., ¶ 11.

The Board does not have unfettered or absolute discretion to award tax credits, but must do so based upon the factors identified in the QAP. The QAP specifically identifies the factors that the Board may consider in making the determination and these factors are the same general factors identified in the QAP and addressed in project applications, i.e., geographical distribution of tax credit projects, rural or urban location of the qualifying projects, overall income levels targeted by the projects, rehabilitation of existing low income housing stock, sustainable energy savings initiatives, financial and operational ability of the applicant to fund, complete, and maintain the project through the extended use period, past performance of an applicant in initiating and completing tax credit projects, and cost of construction, land, and utilities. The Board's discussion of the FHVR project at the April 9, 2012 meeting related to factors that the QAP expressly authorizes the Board to consider. Bair Aff., ¶ 12.

After the April 9, 2012 Board meeting, FHVR requested that the Board reconsider its award determination. At the Board's May 3, 2012 meeting, staff presented to the Board a review of the reasons for the scoring of FHVR's application in the areas addressed in its April 5, 2012 letter. At the same meeting, FHVR also presented to the Board reasons that it believed the scoring was erroneous. After hearing these presentations, the Board declined to further reconsider its tax credit awards. Bair Aff., ¶ 13.

Although FHVR met the mandatory QAP requirements and scored above the minimum point threshold for consideration, the Board did not select FHVR for an award of credits. In addition to FHVR, there were six (6) other applicants for 2012 tax credits that met the mandatory QAP requirements and scored above the minimum point threshold for consideration but which the Board did not select for an award. Bair Aff., ¶ 14.

Based upon the awards determined at the April 9, 2012 meeting, the Board executed contracts with each of the successful LIHTC applicants reserving the tax credit allocations. *See* copies of Montana Board of Housing Low Income Housing Tax Credit Reservation Agreement and Applicable Percentage Election ("Reservation Agreement") forms for respective successful

tax credit applicants, true and correct copies of which are attached as Exhibits D through I to the Board's initial Brief in Support of Motion to Dismiss. The Reservation Agreements contractually bind the Board to allocate tax credits in specific amounts to the particular projects, subject to the projects' submission of certain documents and information, payment of the reservation fees, and subject to compliance with certain regulatory requirements. Bair Aff., ¶ 15.

The Board cannot allocate 2012 tax credits to any other or additional applicants unless tax credits are voluntarily returned to the Board by one or more of the awarded projects, or one or more of the awarded projects fails to meet the periodic milestone requirements during continuing development, construction and placement of the projects in service. Bair Aff., ¶ 16.

III. UNDER THE RELEVANT CIRCUMSTANCES OF THIS CASE, THE COURT CANNOT GRANT EFFECTIVE RELIEF, THEREFORE THE ISSUE IS MOOT, AND SUMMARY JUDGMENT IS PROPER.

As demonstrated in the Board's initial brief, this matter is moot because it is not possible for the Court to grant effective relief in light of the fact that all of the available 2012 tax credits already have been contractually committed to other projects. The developers of these projects have invested substantial funds and incurred substantial obligations in reliance upon their contractual right to the tax credit allocations.

FHVR agrees that the correct test for mootness is whether it is possible for the Court to grant effective relief, but seeks to minimize the importance of third party interests and the inability of the Court to restore the parties to their original positions. While conceding the correct mootness test, FHVR seeks to dilute the impact of the applicable case law by suggesting that the ruling in *Progressive Direct Insurance Co. v. Stuivenga*, 2012 MT 75, 364 Mont 390, 2012 WL 1187591, 276 P.3d 867, lessened the significance of third party interests to the analysis of mootness as well as the consequence of the court's inability to restore parties to their original position.

In fact, the Supreme Court in *Stuivenga* reaffirmed the significance of these factors. The Court held that the issue in determining whether a claim is moot is whether it is possible for the Court to grant effective relief, and recognized that in cases where the rights of third parties are involved, restoring the parties to their original positions may be the only effective relief and, if that is no longer possible, then the matter is moot. *Id.* The Court further stated that the fact that property has changed hands and third-party interests are involved "does not necessarily, in and of

itself," render the matter moot. *Stuivenga,* ¶ 44. However, if the claimant is requesting that the parties be restored to their original positions, "the fact that property has already changed hands and third-party interests are now involved may make this impossible, in which case the appeal will be deemed moot." *Id.*

FHVR is asking this Court to "reverse" the Board's tax credit award determination (Brief at 6) and to declare the Board's award determination invalid (Petition at 6, ¶ 2). In other words, FHVR is asking the Court to restore the parties, including the successful tax credit applicants, to their original pre-award positions, so that no party has received an award of tax credits or entered into a binding contract with the Board requiring allocation of the tax credits. FHVR fails to explain how it is possible to reverse the awards and Reservation Agreements. This is not possible, because the credits have been awarded and the Board has contractually committed to allocate the credits to the third-party applicants. All of the 2012 credits have been allocated and there are no additional tax credits available, so the Board would have to take credits away from another third party in violation of the Reservation Agreement in order to have credits to allocate to FHVR.

The facts in the present case are quite similar to the facts in *Hagerty, Hauswirth* and *Povsha*, all cited in the Board's initial brief. FHVR attempts to distinguish this case from *Hagerty*, arguing that unlike the liquor licenses issued in *Hagerty*, the Board has not actually "issued" the tax credits, the successful applicants have not "used" the tax credits and the ability of the applicants to use the credits is not ensured or guaranteed. This argument has no merit.

The Reservation Agreements provided with the Board's initial Brief in Support of Motion to Dismiss as Exhibits D through I very clearly show that once entered into, the Reservation Agreements are binding contracts. *See* Exhibits D through I to Board's initial Brief in Support of Motion to Dismiss. The Reservation Agreements are binding on the Board and provide that the Board "shall allocate" the specified credit amount as long as the Taxpayer provides the Board with the information required and as long as the building is placed in service by a specified date. Exhibit D to Board's initial Brief in Support of Motion to Dismiss, ¶ 3. The contracts require the applicants (taxpayers) to provide periodic written status reports, submit certain sworn statements (*e.g.*, that the buildings have been placed in service or that certain qualifying basis expenditures have been made as of certain dates), submit certain CPA certifications, meet the technical rules

for qualification of the buildings, and enter into Declarations of Restrictive Covenants with respect to the properties. *Id.*, ¶¶ 2, 7 and 8.

Of course, the licensees in *Hagerty* were ensured or guaranteed continued licensure only if they continued to meet the applicable laws and regulations governing such licenses. If the licensees met such requirements, however, they were entitled to the licenses and the Liquor Control Board was not free to take away the licenses and give them to other parties. The same applies to the tax credits here. As long as the applicant taxpayers perform their obligations under the Reservation Agreements, the Board is required to allocate the tax credits. While the allocation technically does not occur until the project is built and placed in service, no tax credit project would ever be completed if the developer did not have a binding commitment for allocation of the credits that justifies the substantial financial commitment required to build the project.

Moreover, just as the licensees in *Hagerty* invested capital and acquired valuable enterprises in reliance upon the licenses, the third party tax credit applicants have invested substantial resources and incurred obligations in reliance upon the awards and Reservation Agreements. The third party applicants here have contractual rights to allocation of the credits and they have substantially changed their positions in reliance upon those rights. Affidavits have been filed by five of the six successful applicants (now Intervenors) in support of this motion, detailing Intervenors' reliance on the Reservation Agreements.

FHVR is requesting that the parties be restored to their original positions by reversal of the Board's tax credit awards. Third parties have binding contractual rights to the tax credit allocations and have expended substantial sums and incurred significant obligations in reliance upon these contractual rights agreements. Neither these parties nor the Board can be restored to their original positions by reversal of the Board's award determination. This makes it impossible for the Court to grant effective relief in this matter. Accordingly, the matter is moot and should be dismissed.

IV. THE DISTRICT COURT LACKS JURISDICTION FOR JUDICIAL REVIEW OF OR DECLARATORY RULING CONCERNING THE TAX CREDIT AWARD BECAUSE THE AWARD DETERMINATION IS NOT A CONTESTED CASE OR RULE AS DEFINED BY MAPA.

FHVR argues that the tax credit allocation is a MAPA contested case, because the

Board's administrative rule states that the Board will "hold a hearing to consider the allocation of tax credits." FHVR attempts to distinguish *Nye* from the present case and thereby avoid *Nye's* holding that only the legislature or a constitutional provision, and not an administrative agency, can create a right to judicial review.

The Board's initial brief discusses *Nye* in detail. FHVR, however, attempts to distinguish *Nye* asserting that *Nye* involved only an agency policy rather than an administrative rule. FHVR argues that because an administrative rule has the force of law, an administrative rule providing for a hearing triggers a MAPA contested case and ensuing judicial review rights.

In *Nye*, the Court specifically stated that the grievance policy at issue was an "administrative regulation." *Nye*, 639 P.2d at 500. The Court clearly held that a right to judicial review can be provided only by the legislature and not by "agency fiat." The Court held that, to qualify as a contested case under MAPA, there must be either "statutory or constitutional" authority indicating that the party is "required by law" to be given an opportunity for hearing. *Nye*, 639 P.2d at 500-01. FHVR cannot point to any statutory or constitutional right to a hearing regarding the award determination.

FHVR relies solely upon the language of the Board's administrative rule, ARM 8.111.603. FHVR actually cites subsection (3) of ARM 8.111.603, which allows applicants to make presentations to the Board but which makes no mention whatsoever of a "hearing" or "right to hearing." However, subsection (5) of the same rule provides:

> (5) At its regularly scheduled board meeting in the month of April or May of each year, the board will hold a *hearing* to consider the allocation of tax credits to those projects the applications for which meet the minimum criteria of the QAP. *The hearing is not a contested case hearing under Title 2, chapter 4, part 6, MCA.*

ARM 8.111.603(5) (emphasis supplied). Subsection (6) of the same rule further provides:

> (6) After scoring and formulation of recommendations by board staff, applicants will not be permitted to make additional presentations to the board but should be available to the board to answer questions regarding their respective applications.

ARM 8.111.603(6). Because the scoring and formulation of recommendation by staff take place prior to this allocation "hearing," subsection (6) precludes applicants from making any additional presentation to the Board at this "hearing."

The Board's administrative rule clearly reflects that the rule was intended to provide only an opportunity to comment at the "hearing." Applicants have no right to make presentations, much less present evidence and argument, at this "hearing." This is not an adjudication hearing as would and must be provided in a MAPA contested case; it is merely a Board meeting with opportunity to comment. If, as FHVR argues, an administrative rule has the force of law, then the rule language providing that the hearing is not a MAPA contested case hearing is law and, as such, should be accorded respect and given effect.

FHVR's reliance on this administrative rule to create a MAPA contested case and judicial review is misplaced. *Nye* holds that an agency lacks the power to create a right to judicial review. Moreover, if an agency does have the power to create a contested case and judicial review right by rule, then the agency also has the power to eliminate that contested case and judicial review right by repealing the rule. As *Nye* reflects, it was not the point of MAPA to allow agencies to decide whether or not their actions would be subject to contested case procedures or judicial review – that determination is left beyond the agency's control in the hands of the legislature and as embedded in the provisions of the state and federal constitutions.

FHVR also argues that every agency action must be either a contested case or rulemaking under MAPA. FHVR cites no authority for this remarkable proposition. MAPA contains no provision that would encircle every agency action within the defined terms "contested case" and "rule." Clearly, there are numerous agency actions that are neither a contested case nor rulemaking and that, therefore, are not subject to MAPA procedures applicable to these categories of agency action. Agencies enter into contracts, hire and fire employees, apply for and receive federal funding, and award grants and other funding, all without being subject to MAPA contested case or rulemaking proceedings. Such actions would, of course, be subject to contested case or rulemaking proceedings where the legislature has so provided or where a constitutional property interest is at stake. But otherwise, an agency action is a contested case or a rule only if such action meets MAPA's statutory definitions of these terms.

Montana's administrative procedure act, MAPA, was modeled on the 1961 Revised Model State Administrative Procedure Act. *See* Chapter Compiler's Comments in Annotations to Mont. Code Ann. Title 2, Ch. 4. The 1961 Model Act included the defined terms "contested

case" and "rule." The changes reflected in the later 1981 version of the Model Act demonstrate that the 1961 act did not encompass judicial review of all agency actions.

The revised 1981 Model Act added the defined term "agency action," which was broadly defined to include:

> (i) The whole or a part of a rule or an order;
> (ii) The failure to issue a rule or an order, or
> (iii) an agency's performance of, or failure to perform, any other duty, function, or activity, discretionary or otherwise.

Uniform Laws Annotated, Volume 15, p. 11, 1981 Model Act, Section 1-102(2). The term "order" is defined in the 1981 Model Act as "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons." Uniform Laws Annotated, Volume 15, p. 11, 1981 Model Act, Section 1-102(5).

The comments to the 1981 Model Act state that the term "agency action" includes more than rulemaking and contested cases:

> It goes much further, however. Subparagraph (iii) makes clear that "agency action" includes everything and anything else that an agency does or does not do, whether its action is discretionary or otherwise. There are no exclusions from that all-encompassing definition. As a consequence, there is a category of "agency action" that is neither an "order" nor a "rule" because it neither establishes the legal rights of any particular person nor establishes law or policy of general applicability. The principal effect of the very broad definition of "agency action" is that everything an agency does or does not do is subject to judicial review.

Uniform Laws Annotated, Volume 15, pp. 12-13. Section 5-102 of the 1981 Model Act grants a right to judicial review of every final agency action. Uniform Laws Annotated, Volume 15, p. 119. Montana has not adopted the changes reflected in the 1981 Model Act.

If, as FHVR argues, MAPA treats every agency action as either a contested case or rulemaking, then the changes in the 1981 Model Act would have been unnecessary and superfluous. Montana's version of the 1961 Model Act does not treat every agency action as either a contested case or rule.

As demonstrated in the Board's initial brief, the Board's tax credit award determination is not a "rule" as defined by MAPA. Although a "rule" as defined in MAPA would be subject to

declaratory ruling under Mont. Code Ann. §2-4-506, the Board's *award determination* is not reviewable under the MAPA declaratory judgment provision relied upon by FHVR. Moreover, there is no statutory or constitutional provision indicating that the tax credit award determination must be made after opportunity for a hearing. Accordingly, the award determination is not a contested case and there is no corresponding right to judicial review under MAPA.

FHVR argues that even if the Court finds that MAPA does not provide for judicial review of the Board's determination, the determination is nonetheless subject to non-MAPA judicial review based upon *Johansen v. Dep't of Natural Res. and Conservation*, 1998 MT 51, 288 Mont. 39, 955 P.2d 653. FHVR did not plead a request for non-MAPA judicial review. In any event, *Johansen* is distinguishable based upon the nature of the interest at stake in that case.

Johansen involved cancellation of a lease of agricultural land by the Department of Natural Resources and Conservation ("DNRC") based upon the lessee's failure to make timely lease payments. 1998 MT 51, ¶ 1. The lessee's family, beginning with the lessee's grandfather, had leased the land in question from the State "[f]or decades." 1998 MT 51, ¶ 3. For the previous 38 years, the lessee and his father had mailed the lease payments from their rural postal box, by leaving the envelope and money to cover the postage in the postal box. On December 29, prior to the December 31 due date, the lessee attempted to mail the lease payment in the same fashion, but the postal carrier left a note stating that she did not pick up the envelope because snow had blown into the box and the letter carrier could not locate all of the money to pay the required postage. 1998 MT 51, ¶¶ 4-5.

The lessee went to the mailbox on December 30 and found the letter carrier's note. He removed the snow and again left the payment envelope and postage money in the mailbox. The letter carrier found the letter and the postage money, but again declined to take the letter, leaving a note stating that she did not have more stamps and could not get more because it was a Saturday. The post office was closed the next 2 days because they were legal holidays, so mail was not delivered. On January 2, the lessee went to the mailbox and discovered the note and undelivered letter. The same day, he drove to town and mailed the letter from the post office. However, the letter was not postmarked until January 3. 1998 MT 51, ¶¶ 6-7.

DNRC then notified the lessee that the lease was cancelled for failure to timely pay rent. The lessee requested reinstatement of the lease under a statutory provision allowing reinstatement

of a lease where "the violation is not serious enough to warrant cancellation." In the alternative, the lessee requested a MAPA contested case hearing. 1998 MT 51, ¶¶ 8-9. DNRC admitted that if the letter had been postmarked January 2 rather than January 3, it would not have cancelled the lease. Nonetheless, DNRC denied an opportunity for a contested case hearing, asserting that there were no issues of fact because the lessee could not prove that he placed the payment in the mailbox in a timely fashion and because it asserted that the postal service routinely accepted letters for mailing without postage affixed. To the contrary, the lessee obtained letters and affidavits from the postmaster and the letter carrier verifying his statements about his attempt to mail the letter. 1998 MT 51, ¶¶ 10-13.

DNRC refused the lessee's repeated requests for reinstatement, hearing or appeal. The lessee petitioned the district court for judicial review, but the district court determined that the matter was not a contested case, denied judicial review and dismissed the action. 1998 MT 51, ¶¶ 13-14. The Supreme Court agreed that the matter was not a MAPA contested case and that there was no MAPA judicial review right, but concluded that there was a right to judicial review nonetheless. 1998 MT 51, ¶ 19.

The Supreme Court found there was no statutory provision requiring a hearing. It appears that the matter logically should have been determined to be a MAPA contested case proceeding because the lessee apparently had a property interest in the lease. However, the Supreme Court concluded that the lessee had failed to cite authority for that position and that the Supreme Court had no obligation to conduct legal research on the lessee's behalf. 1998 MT 51, ¶¶ 22-24.

Having found no MAPA contested case right under these egregious facts, the Court found a right to judicial review based upon the standard of review for "informal agency actions" set forth in *North Fork Pres. v. DSL*, 238 Mont. 451, 778 P.2d 862 (1989). In *North Fork*, the Court found a right to judicial review of an agency approval of an operating plan on an oil and gas lease where the agency had failed to prepare a legally mandated environmental impact statement. 1998 MT 51, ¶¶ 18, 25-26.

Unlike *Johansen*, the present case does not involve deprivation of any property interest. On the contrary, the federal courts have held that applicants have no property interest in an award of low income housing tax credits tax, even where the applicant has the highest ranked or highest scoring application, and that neither the federal tax code nor the Regulations require an award of

the tax credits to the high-scoring applicant. *Barrington Cove Limited Partnership v. Rhode Island Housing and Mortgage Finance Corporation*, 246 F.3d 1, ___ (1st Cir. 2001); *DeHarder Investment Corp. v. Indiana Housing Finance Authority*, 909 F. Supp. 606, _____ (S.D. Indiana 1995). If, as FHVR alleges, there is some inherent right to judicial review of every agency action or decision, then *Nye* and every other case denying judicial review of any agency action were wrongly decided.

For these reasons, the Board submits that the tax credit award determination is not subject to judicial review.

The Board's determination clearly is not a contested case subject to MAPA judicial review. A holding that the tax credit award determination is a contested case would require that the determination be made through a trial-type adjudication hearing, a conclusion for which there is no authority and one that would make the determination highly impractical and difficult to complete in the time required to take advantage of federally allocated tax credits. In the event that the Court determines there is any right of judicial review of the Board's determination, any such review must be based upon the standard of review articulated in *North Fork* and *Johansen* rather than MAPA.

V. THE DISTRICT COURT SHOULD DISMISS THE DECLARATORY JUDGMENT REQUEST BECAUSE THE CLAIM IS CONTRARY TO ESTABLISHED LAW.

In its initial brief, the Board set forth the reasons that FHVR cannot prevail on its declaratory judgment claim. FHVR argues, however, that there is a basis for declaratory judgment in addition to the alleged "unchecked discretion" to allocate tax credits. FHVR argues that the Board has failed to account for its claims that the 2012 infringes on the commerce power of the U.S Congress and that the 2012 QAP fails to comply with "mandatory requirements under federal law." FHVR has failed to identify any basis for such claims, and it is impossible to respond to FHVR's non-specific allegation of failure to comply with other "mandatory requirements under federal law."

FHVR erroneously suggests that the QAP's criteria are applied solely through the scoring process and that, by exercising its authority to award projects other than based upon scoring, the Board "discards" the federally mandated criteria and makes the award contrary to the QAP.

FHVR has misrepresented the nature of the Board's authority to select the projects for allocation of tax credits. This authority is not "unchecked" or unfettered discretion," but rather must be exercised in consideration of the factors specified in the QAP. As stated in the QAP and the Board's administrative rule, the Board's allocation is to be based upon the Board's determination that the project selected best meet the needs of low income people within the state of Montana, taking into consideration the factors specified in the QAP. *See* Exhibit C to Board's initial Brief in Support of Motion to Dismiss, QAP , pp. 24-25 ARM 8.111.603(7).

The Board's determination is made based upon the criteria set forth in the QAP and in compliance with federal law. FHVR has not responded to or addressed the compelling legal authority for the Board's position provided by *Barrington Cove Limited Partnership v. Rhode Island Housing and Mortgage Finance Corporation*, 246 F.3d 1 (1st Cir. 2001) and *DeHarder Investment Corp. v. Indiana Housing Finance Authority*, 909 F. Supp. 606 (S.D. Indiana 1995). These authorities clearly indicate that the QAP's provision reserving to the Board authority to select projects for awards complies with the federal tax credit law and regulations.

FHVR also argues that the Board has failed to account for its claim that the 2012 QAP infringes on the Commerce Power of the U.S. Congress. Its Petition alleges that the QAP "included a scoring preference for Montana based applicants and consultants in violation of the interstate commerce clause of the U.S. constitution." Ft. Harrison's Petition fails to set forth this allegation in any further detail.

One of the QAP's scoring criteria considers the degree to which the members of the development team have a Montana presence. This section of the 2012 QAP provides:

> Demonstration of a Montana Presence. In order to assist in providing a better quality product consistent with the purposes of the MBOH and federal law, a development will qualify for points if a member of its development team is Montana based. One (1) point will be awarded for each of the following (0-4 points maximum):
>
> - Developer or Project Manager. (A developer has existing affordable housing project(s) in Montana with a demonstrated quality product.)
> - Contractor or Construction Manager
> - Either the Consultant, Syndicator, Attorney, Accountant, Architect or Engineers

Exhibit C to Board's initial Brief in Support of Motion to Dismiss, QAP, p. 23. This QAP provision is interpreted and applied by the Board staff in scoring to mean that the listed team members have a physical presence of some kind in the state of Montana, such as owning an affordable housing project in Montana, being licensed in Montana (e.g., a licensed contractor), or having an office in Montana. This provision has not been and is not interpreted or applied to require that applicants, developers or team members be Montana businesses, entities or residents. Bair Aff., ¶ 17-18.

Consideration of Montana presence rationally relates to the ability of the development team to successfully plan, permit, develop, construct and bring a project into service for the intended beneficiaries of the program, *i.e.,* persons needing and qualifying for low-income housing. This consideration is designed to assist in assuring that allocated tax credits actually result in bringing into service the housing units contemplated in awarding the credits, rather than having the credits returned because the project could not be completed in the local Montana building environment within the applicable time limits and in compliance with other requirements. Bair Aff., ¶ 21.

This provision of the QAP does not provide a preference – it merely provides for consideration of the development team's experience and expertise in development and construction in the actual market in which the project will be constructed – the State of Montana. FHVR's application listed a firm without any Montana presence or experience as its contractor and construction manager. Based upon the involvement of other team members with Montana presence, the application was awarded 2 out of 4 possible points in this area. FHVR's application met the mandatory requirements of the QAP and exceeded the minimum development selection criteria score of 80 points, and was therefore fully considered by the Board for an award of tax credits. Bair Aff., ¶¶ 19-20. The QAP does not include any impermissible preference or other violation of the commerce clause of the U.S. Constitution.

CONCLUSION

FHVR's should be dismissed. It is not possible for the Court to grant effective relief because the Board has already committed contractually to allocation of all 2012 tax credits to other applicants and has no tax credits available to award to FHVR. Therefore, Petitioner's claims are moot and the Court should dismiss them for lack of subject matter jurisdiction.

In addition, the Court lacks subject matter jurisdiction to undertake a judicial review of the tax credit allocation either as a contested case or rulemaking proceeding, and the legislature has not granted any other right of judicial review of the determination. Petitioner's declaratory judgment request fails to state a claim and should be dismissed because Petitioner's scoring allegations, even if assumed to be true, do not entitle Petitioner to an award of tax credits and because the QAP complies with federal law requirements. Petitioner has not contested dismissal of its claim for injunctive relief, and that claim should also be dismissed.

Respectfully submitted this 27th day of July, 2012.

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CERTIFICATE OF SERVICE

I, Gregory G. Gould, certify that on the 27th day of July, 2012, a true and accurate copy of the foregoing RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT was duly served upon counsel of record listed below by depositing the same, postage prepaid, in the United States mail to:

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